Supreme Court, U.S.
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No. 98-_____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

DEPARTMENT OF ENVIRONMENTAL PROTECTION
of the State of Florida,

Petitioner,

vs.

BOUCHARD TRANSPORTATION COMPANY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Eleventh Amendment allows an admiralty court to compel a state to file or forfeit claims in a proceeding under the Limitation of Liability Act.

II. Whether private vessel owners proceeding under the Limitation of Liability Act may bring, in response to a state's compelled maritime claim, common or state law counterclaims for damages which would be barred by the Eleventh Amendment.

LIST OF PARTIES

Boca Ciega Hotel, Inc.

Bouchard Transportation Company, Inc., for exoneration from or limitation of liability as owner or as owner pro hoc vice of Tug Capt. Fred Bouchard and Barge B. No. 155

Department of Environmental Protection, State of Florida

Hiong Guan Navegacion Co., Ltd., as charterer of the M/V Balsa 37, Official Number 228571

Maritrans Operating Partners L.P., for exoneration from or limitation of liability as owner of the tug Seafarer, official number 532672, and Barge Ocean 255, official number 534910

Maritrans General Partner, Inc., for exoneration from or limitation of liability as owner of the tug Seafarer, official number 532672, and Barge Ocean 255, official number 534910

Tsacaba Shipping Company Limited, as owner of the M/V Balsa 37, Official Number 228571

Tug Captain Fred Bouchard Corporation, for exoneration from or limitation of liability as owner or as owner pro hac vice of Tug Capt. Fred Bouchard and Barge B. No. 155

United States of America

Ambrose G. Updegraff

Ramona M. Updegraff

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33 U.S.C. §2701 *et seq.* (Oil Spill Act of 1990) 3,*passim*

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No. 98-_____

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion by the Eleventh Circuit Court of Appeals (App. A) is reported at 147 F.3d 1344. The opinion of the U.S. District Court for the Middle District of Florida (App. B) is not reported.

JURISDICTION

The decision below was a final decision by the Eleventh Circuit Court of Appeals on July 31, 1998. There were no motions for rehearing. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1), and Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Limitation of Liability Act is found at 46 U.S.C.A. §§181-192. (*See* App. D.) It provides in part:

> **§185. Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee**
>
> The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and

freight, or approved security therefor[.]

* * *

Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

STATEMENT OF THE CASE

Two tugs pushing barges and a freighter collided in Tampa Bay, spilling about 328,000 gallons of oil, in August 1993. The vessels' owners filed petitions under the Limitation of Liability Act (App. D) in the district court, and stipulated to vessel and cargo values totaling about $14.1 million.[1]

The district court, pursuant to Supp. Rule F, Fed. R. Civ. P. (App. E), enjoined all other pending actions against the vessel owners. The court ordered the clerk to issue a notice requiring all claims be filed within 60 days (by April 11, 1994) or face default.

Petitioner, the Florida Department of Environmental Protection (DEP) filed answers and claims in the limitation action. In addition to a maritime claim for damage to natural resources, DEP lodged claims under the federal Oil Spill Act of 1990 (OPA 90), 33 U.S.C. §2701 *et seq.*; and the Florida Pollutant Spill Prevention and Control Act, §§376.011-.21, Florida Statutes (Florida Act).

In response, Bouchard and Maritrans filed numerous counterclaims specifically against the "State of Florida." These counterclaims were based on negligence, indemnification, public

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[1]The stipulated values were $900,000 for Tscaba; about $8.4 million for Bouchard; and about $4.8 million for Maritrans.

nuisance, and unjust enrichment, among other theories. Altogether, Bouchard and Maritrans each sought damages for over $75 million.

DEP moved to dismiss based on the Eleventh Amendment. Without ruling, the district court ordered the parties to mediation. DEP appealed; the Eleventh Circuit Court of Appeals held the delay in ruling on the Eleventh Amendment issue was error and remanded. Bouchard v. Florida Dept. of Environmental Protection, 91 F. 3d 1445 (11th Cir. 1996).

On remand, the district court granted the DEP's motion. It also dismissed the OPA 90 and Florida Act claims on the ground that those claims did not have to be brought in the limitation action in federal court. (*See* Appendix B.) It dismissed the vessel owners' counterclaims, but did so without prejudice, and lifted its injunctions against those state court actions in which DEP brought claims under OPA 90, the Florida Act, and maritime tort.

The vessel owners appealed. The Eleventh Circuit, in the opinion under review, reversed as to the Eleventh Amendment, finding this case was analogous to an *in rem* admiralty action and not a proceeding against Florida as a state. It affirmed dismissal of the OPA 90 and the Florida Act claims. (*See* Appendix A.)

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit Has Decided Important Questions of Federal Law That Have Not Been, But Should Be, Settled By This Court.

By reversing as to DEP's assertion of Eleventh Amendment immunity, the circuit court upheld application of the Limitation of Liability Act to compel Florida into admiralty court. Now, DEP must defend against numerous common and state law counterclaims[2] for damages brought by private vessel owners. These counterclaims far exceed the stipulated value of the vessels and cargo; and, if brought as freestanding actions, would be barred by the Eleventh Amendment. The Limitation of Liability Act has trumped the Eleventh Amendment, despite the fact recovery on the counterclaims would come from Florida's treasury.

In so doing, the Eleventh Circuit decided two important questions of federal law that have not been, but should be, settled by this Court. The first is whether the Eleventh Amendment allows an admiralty court, in a proceeding under the Limitation of Liability Act, to compel a state to file or forfeit claims. If the answer is "yes," then a second question arises: whether private vessel owners proceeding under the Limitation of Liability Act may bring, in response to a state's compelled maritime claim, common or state law counterclaims for damages which would be barred by the Eleventh Amendment.

The decision below could be applied to all states bordering

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[2]As a result of the decision below, DEP's maritime claim is not dismissed from the limitation action. Bouchard and Maritrans' counterclaims, dismissed without prejudice, were not specific; but were lodged against the "State of Florida". DEP faces the possibility of amended counterclaims.

waters subject to federal admiralty court jurisdiction. It departs so markedly from established Eleventh Amendment jurisprudence that there is no need to let the law evolve in the circuit courts. This Court should grant certiorari under Rule 10(c).

I. Whether the Eleventh Amendment allows an admiralty court to compel a state to file or forfeit claims in a proceeding under the Limitation of Liability Act.

The decision below held the Eleventh Amendment does not bar an admiralty court from requiring a state to file or forfeit claims in a proceeding under the Limitation of Liability Act. The crux of the decision is its analogy to California v. Deep Sea Research, __ U.S. __, 118 S.Ct. 1464 (1998). There, this Court concluded:

> the Eleventh Amendment does not bar the jurisdiction of a federal court over an in rem admiralty action where the res is not within the State's possession." [e.s.]

Id., 118 S.Ct. at 1467.

Expounding the analogy, the Eleventh Circuit said:

> Although this admiralty limitation proceeding is not an in rem action, it is sufficiently analogous for Deep Sea Research to compel the conclusion that Florida is not entitled to sovereign immunity. Like an in rem proceeding, the plaintiffs in the limitation proceeding neither named any specific entities as defendants in their complaints nor formally served process on any defendants.

> Instead, the plaintiffs posted security bonds with the district court in the amount of their maximum liability and the district court notified potential claimants to make their claims on the res deposited with the district court. As in Deep Sea Research, Florida does not have possession of the disputed res--the bonds are part of the record of this case, currently in the possession of the federal judiciary. Accordingly, we hold that Florida is not entitled to Eleventh Amendment immunity from the limitation proceeding. [e.s.]

Bouchard, 147 F.3d at 1349.

Deep Sea Research, an *in rem* admiralty action solely over ownership of an historic shipwreck, did not involve the Limitation of Liability Act. Conversely, this case--not an *in rem* action--does not involve a dispute over vessel ownership.[3] At no time has DEP contested the owners' asserted interests or asserted an ownership interest in any of the vessels. Simply put, this case has never had the essential attribute of an *in rem* action--a dispute over ownership or control of property. Absent this attribute, the Eleventh Circuit's analogy to Deep Sea Research fails.

That analogy was also premised on the fact "the plaintiffs in the limitation proceeding neither named any specific entities as defendants nor formally served process on any defendants." This

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[3] Although the Deep Sea Research Court attached much importance to "possession" throughout the opinion, a careful reading shows that the real issue was the parties' competing claims of ownership. The controversy arose through California's claim of ownership. Certiorari was granted to address "whether a State's Eleventh Amendment immunity in an in rem admiralty action depends upon evidence of the State's ownership of the res[.]" *Id.*, 118 S.Ct. at 1469. [e.s.]

observation overlooks the fact DEP was named as a defendant in the counterclaims filed by Bouchard and Maritrans, both of which sought damages "in excess of seventy-five million dollars." (*See* App. C. p. 28 at ¶36) The aggregate amount ($150 million) is about 11 times more than Bouchard and Maritrans' combined stipulations of value of $13.2 million.

The decision below did not address the counterclaims. Consequently, the court was oblivious to the fact any recovery by the vessel owners would have to come from Florida's treasury.

Given DEP's maritime claim was filed under compulsion, the fact the "State of Florida" was named in the counterclaims rather than in the initial complaint is a distinction without a difference. The amount of damages alleged is far beyond the value of the vessels; the theories of recovery under the counterclaims were not responsive to DEP's maritime claim. The presence of such counterclaims changed the limitation proceeding into something far different from an *in rem* action.

Lastly, the circuit court did not account for the fact the vessel owners, in their "Complaint for Exoneration from or Limitation of Liability," expressly requested the admiralty court to issue notice of the limitation action to the State of Florida, among others. The vessel owners also requested injunctive-type orders be issued against pending and future lawsuits, thereby staying DEP's administrative action. While it is correct to say DEP was not formally named or served as a defendant, the actual events of this case render the observation meaningless. The "State of Florida" was effectively named as a defendant at the outset through the request for issuance of notice; the "State of Florida" was specifically named as a defendant to numerous counterclaims. Together these events are tantamount to formal service for Eleventh Amendment purposes.

The Eleventh Circuit's reliance on Deep Sea Research missed the mark. The court too readily treated the vessel owners' security bonds as surrogates for the actual vessels, and concluded the limitation proceeding was analogous to an *in rem* admiralty action not barred by the Eleventh Amendment.

Through this rationale, the Eleventh Circuit raised and answered an important federal question not answered by Deep Sea Research: whether the Eleventh Amendment bars compelling a state's appearance in a Limitation Act proceeding. The decision below has gouged a large hole in Eleventh Amendment jurisprudence. Not only has Florida been compelled to answer a complaint in limitation by private vessel owners, it has been forced to defend against the owners' numerous common and state law counterclaims. This Court must settle the matter.

The Eleventh Circuit perceived the issue as one of first impression for a circuit court. *See* Bouchard, 147 F.3d at 1348 ("Florida asserts that it is entitled to Eleventh Amendment immunity from the limitation proceeding .... No Court of Appeals has addressed this issue."). By granting certiorari, this Court can correct wayward application of Deep Sea Research before other circuits can follow the Eleventh.

II. Whether Private Vessel Owners Proceeding under the Limitation of Liability Act May Bring, in Response to a State's Compelled Maritime Claim, Common or State Law Counterclaims for Damages Which Would Be Barred by the Eleventh Amendment.

DEP was required to timely file its claims within 60 days or be barred by operation of Supp. Rule F, parts (4)-(6). (*See* App. E, p. 45-6). Faced with this Hobson's choice, DEP filed its

claims and challenged the admiralty court's jurisdiction on Eleventh Amendment grounds.

Two of three vessel owners filed counterclaims. Those filed by Bouchard are representative. Eight altogether, they allege negligence/gross negligence, public nuisance, and unjust enrichment; indemnity, contribution, recoupment/set-off, and subrogation; and a statutory claim against Florida's coastal Protection Trust Fund. All are actions under common or state law. All seek monetary damages from the "State of Florida" (*see* App. C), and would require recovery from the state's treasury. They proceed against Florida as a state, and are not *in rem* actions.

In short, the counterclaims--which would certainly be barred by the Eleventh Amendment if brought as freestanding actions--have swallowed the "maritime" nature of the limitation action, and circumvented the Eleventh Amendment. Neither this Court's decision in Deep Sea Research, any cases cited therein, nor Eleventh Amendment jurisprudence tolerate such an expansion of admiralty jurisdiction.

A parallel observation illustrates the problem caused by the decision below. One might accept the formidable legal fiction that the vessel owners' security was a surrogate for the actual vessels; so that the limitation proceeding originally was analogous to an *in rem* action. However, when Bouchard and Maritrans voluntarily filed counterclaims relying on common and state law, and sought damages greatly exceeding the value of their vessels; they voluntarily transformed the litigation into a non-*in rem* civil action which should have been brought in state court.

Any recovery on the counterclaims would come from the treasury of the State of Florida. The decision below simply

overlooked this. *See, in contrast*, Sea Services of the Keys, Inc., v. State of Florida, __ F.3d __, 1998 WL 681473, *2 (11th Cir. Oct. 2, 1998) (relying on Deep Sea Research to affirm denial of Eleventh Amendment immunity in ownership dispute between state and private claimant to seized drug boat, when Florida had not yet perfected legal title to boat; and observing: "Additionally, Sea Tow's seeking of title to and/or a marine salvage award against the defendant boat imposes no liability against public funds in Florida's treasury." [e.s.]).

Thus, the decision below creates an untenable rift in the Eleventh Amendment--that common and state law claims may be brought by private citizens against a state's treasury in admiralty court, so long as the claims are in the form of counterclaims to a compulsory maritime claim by the state. Again, the decision below raises and wrongly answers an important question of federal law: whether private vessel owners proceeding under the Limitation of Liability Act may bring, in response to a state's compelled maritime claim, common or state law counterclaims for damages which would be barred by the Eleventh Amendment. This Court should grant certiorari to announce the correct answer; and, incidentally, clarify the reach of Deep Sea Research.

CONCLUSION

The decision below raises two important questions of federal law which must be settled by this Court. The Court should grant DEP's petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals,

Eleventh Circuit.

Nos. 96-3494, 96-3605 and 96-3727.

BOUCHARD TRANSPORTATION COMPANY, INC., for exoneration from or limitation of liability as owner or as owner pro hoc vice of Tug Capt. Fred Bouchard and Barge B. No. 155, Tug Captain Fred Bouchard Corporation, for exoneration from or limitation of liability as owner or as owner pro hac vice of Tug Capt. Fred Bouchard and Barge B. No. 155, et al., Plaintiffs-Appellants,

v.

Ramona M. UPDEGRAFF, Ambrose G. Updegraff, et al., Claimants-Appellees,

Boca Ciega Hotel, Inc., et al., Movants-Appellees.

TSACABA SHIPPING COMPANY LIMITED, as owner of the M/V Balsa 37, Official Number 228571, Hiong Guan Navegacion Co., Ltd., as charterer of the M/V Balsa 37, Official Number 228571, et al., Plaintiffs-Appellants,

v.

ENVIRONMENTAL PROTECTION AGENCY, State of Florida, United States of America, et al., Claimants-Appellees,

Boca Ciega Hotel, Inc., Movant-Appellee.

MARITRANS OPERATING PARTNERS L.P., for exoneration from or limitation of liability as owner of the tug Seafarer, official number 532672, and Barge Ocean 255, official number 534910, Maritrans General Partner, Inc., for exoneration from or limitation of liability as owner of the tug Seafarer, official number 532672, and Barge Ocean 255, official number 534910, Plaintiffs-Appellants,

v.

Ramona M. UPDEGRAFF, Ambrose G. Updegraff, et al., Claimants-Appellees,

Boca Ciega Hotel, Inc., et al., Movants-Appellees.

July 31, 1998.

Appeals from the United States District Court for the Middle District of Florida. (Nos. 94-233-CIV-T-23, 93-1399-CIV-T-23A, 94-227-CIV-T-21B), Steven D. Merryday, Judge.

Before COX, DUBINA and BLACK, Circuit Judges.

BLACK, Circuit Judge:

This appeal presents three issues: (1) whether the State of Florida, Department of Environmental Protection (Florida), is entitled to Eleventh Amendment sovereign immunity from a maritime limitation proceeding initiated pursuant to Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims (Rule F); (2) whether claims brought pursuant to the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-2761 (OPA 90), are subject to Rule F and therefore constrained to Rule F limitation proceedings; and (3) whether claims brought pursuant to Florida's Pollution Discharge Prevention and Control Act, Fla. Stat. ch. 376.011-.17, 376.19-.21 (Florida Act), are subject to

Rule F and therefore constrained to Rule F limitation proceedings.

I. BACKGROUND

A freighter and two tugs pushing petroleum-carrying barges collided in Tampa Bay on August 10, 1993. Within six months of the collision, the owners of the three vessels (Owners) each filed a complaint in the district court for exoneration from or limitation of liability in accordance with Rule F.

A. *Statutory Framework*

Rule F evolved as a procedural device to implement the Limitation of Shipowner's Liability Act of 1851, 46 U.S.C. App. §§ 181-196 (Limitation Act). The Limitation Act generally limits the liability of a shipowner for claims brought under general maritime law or common law to the value of the vessel and the freight then pending.[1] 46 U.S.C. App. § 183. Rule F implements the provisions of the Limitation Act by providing a mechanism for the pro rata distribution among claimants of the fund created by the Limitation Act's liability limits. *See Beiswenger Enters. Corp. v. Carletta,* 86 F.3d 1032, 1036 (11th Cir.1996), *cert. denied,* --- U.S. ----, 117 S.Ct. 2455, 138 L.Ed.2d 213 (1997).

In 1872, the Supreme Court recognized that the Limitation Act did not establish any judicial procedure by which a vessel owner could seek to enforce the Act's liability limits. *Norwich & N.Y. Transp. Co. v. Wright,* 80 U.S. (13 Wall.) 104, 123, 20 L.Ed. 585 (1871). To fill this void, the Court set forth a

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[1]Congress enacted the Limitation Act to promote investment in shipbuilding. *British Transp. Comm'n v. United States,* 354 U.S. 129, 133, 77 S.Ct. 1103, 1105, 1 L.Ed.2d 1234 (1957).

procedure by which vessel owners could initiate a limitation proceeding to establish a concursus of claims. *Id.* at 124-25. The Court codified this procedure by adding to the Rules of Practice for the Courts of the United States in Admiralty and Maritime Jurisdiction (Admiralty Rules). *See* Appendix to 80 U.S. (13 Wall.) (1871). Over time, the Admiralty Rules were variously amended, renumbered, and re-labeled. The present form, entitled the Supplemental Rules for Certain Admiralty and Maritime Claims (Rules A-F), was adopted in 1966.

Rule F(1) states that a "vessel owner may file a complaint in the appropriate district court ... for limitation of liability pursuant to statute." Rule F(1) requires the vessel owner to deposit with the district court or a trustee a security in an amount tied to the "value of the owner's interest in the vessel and pending freight." After the shipowner posts security, Rule F(4) instructs the district court to "issue a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice." Upon the shipowner's request, Rule F(3) directs the district court to "enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action." Claimants asserting valid claims receive a pro rata distribution of "the fund deposited or secured, or the proceeds of the vessel and pending freight." Rule F(8).

OPA 90 explicitly supersedes the Limitation Act's liability limits with respect to claims for cleanup costs and damages resulting from a discharge of oil, and establishes its own schedule of liability limits for damages resulting from the oil discharge. 33 U.S.C. § 2704. The Owners allege their liability is limited under OPA 90 to $1,200 per gross ton per

vessel. *See* 33 U.S.C. § 2704. OPA 90 also explicitly permits states to adopt laws imposing additional liability for oil spills above the liability limits established by OPA 90 and the Limitation Act. 33 U.S.C. § 2718. Consistent with this provision, the Florida Act imposes additional liability for oil spills.

B. *Procedural History*

Each Owner's complaint initiated a limitation proceeding in the district court, in which each Owner separately sought exoneration or limitation of their respective liability. The Owners of the petroleum-carrying tank barges sought limitation of liability under the Limitation Act for claims brought pursuant to general maritime and common law, and sought limitation of liability under OPA 90 and the Florida Act for claims resulting from the discharge of oil. The Owner of the freighter sought limitation of liability under the Liability Act only. Notices were issued to potential claimants that all claims against each of the Owners had to be filed in the respective limitation proceeding within 60 days or the right to recover from the Owners would be forfeited. Pursuant to Rule F(3), the district court entered injunctions staying all other proceedings against the Owners in connection with the collision, thereby requiring that claims under OPA 90 and the Florida Act be brought in the limitation proceedings. Each injunction created a concursus of all claims against the respective Owner. The district court consolidated the three limitation actions with four other cases arising out of the collision, thereby creating a single, consolidated proceeding.

The claims filed against the Owners in the limitation proceeding include the following: (1) the Owners' claims against each other under general maritime law, OPA 90, the Florida Act, and common law; (2) one tug crew's claims under general maritime law and the Jones Act for personal injuries; (3) a Coast

Guard reservist's claim under general maritime law for injuries resulting from exposure to petroleum during the rescue effort; (4) the United States' claims under general maritime law, common law, and OPA 90 for cleanup costs, damage to natural resources, and response and monitoring costs, as well as subrogation claims pursuant to OPA 90; (5) Florida's claims under OPA 90, the Florida Act, and general maritime law for clean-up costs, damage to natural resources, response costs, and reimbursement costs; and (6) private parties' claims, brought individually and as a purported class, under OPA 90, the Florida Act, common law, and general maritime law for damages suffered as a result of the spills.

This case has a long and complicated procedural history.[2] We are concerned here with three of the district court's rulings. First, the district court ruled that Florida is entitled to sovereign immunity from the limitation proceeding. Second, the district court dismissed without prejudice the OPA 90 claims, concluding that claims brought pursuant to OPA 90 are not subject to Rule F and therefore cannot be constrained to the limitation proceeding. Third, the district court dismissed without prejudice the Florida Act claims based on the same reasoning. The Owners appeal all three of these rulings. We reverse the district court's ruling that Florida is entitled to Eleventh Amendment immunity from the limitation proceeding, but affirm the district court's dismissal of the OPA 90 and Florida Act claims.

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[2]This case has been before the Eleventh Circuit several times already. Most recently, this Court determined that the district court had to rule on Florida's claim of Eleventh Amendment immunity before the district court could require Florida to participate in mediation. *In re Bouchard Transp. Co. v. Florida Dept. of Envtl. Protection*, 91 F.3d 1445, 1448-49 (11th Cir.1996).

II. STANDARD OF REVIEW

We review de novo the district court's order dismissing Florida from the limitation proceeding on the basis of Eleventh Amendment immunity. *Seminole Tribe of Florida v. Florida,* 11 F.3d 1016, 1021 (11th Cir.1994), *aff'd,* 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). We also review de novo the district court's order dismissing the OPA 90 and Florida Act claims based on its conclusion that Rule F is not applicable to those claims. *See DeKalb County Sch. Dist. v. Schrenko,* 109 F.3d 680, 687 (11th Cir.), *cert. denied* --- U.S. ----, 118 S.Ct. 601, 139 L.Ed.2d 489 (1997).

III. DISCUSSION

A. *Whether Florida is Entitled to Eleventh Amendment Immunity from the Limitation Proceeding*

Florida filed various claims in the limitation proceeding pursuant to the Florida Act, OPA 90, and general maritime law. Florida asserts that it is entitled to Eleventh Amendment immunity from the limitation proceeding and, therefore, that its claims should not be subject to the limitation proceeding. We must resolve this assertion of sovereign immunity before we may address the other issues involved in this appeal. *Seaborn v. State of Fla., Dep't of Corrections,* 143 F.3d 1405, 1407 (11th Cir.1998). No Court of Appeals has addressed this issue.[3]

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[3]Two district courts have addressed this issue; both held that a limitation proceeding is not a suit against a state in violation of the Eleventh Amendment. *See In re Abaco Treasure Ltd.,* 1993 A.M.C. 1976, 1977 (S.D.Fla.1993); *In re Sand Bar I, Inc.,* 1993 A.M.C. 1312, 1317 (E.D.La.1992).

The Eleventh Amendment prevents a suit in federal court against a state by a citizen of that state or any other state. *California v. Deep Sea Research,* --- U.S. ----, ----, 118 S.Ct. 1464, 1470, 149 L.Ed.2d 626 (1998).[4] We therefore must determine whether the filing of a limitation proceeding pursuant to Rule F constitutes a suit against Florida.

In ruling on this issue, the district court did not have the benefit of the Supreme Court's opinion in *Deep Sea Research,* which addresses the application of the Eleventh Amendment in the context of an admiralty in rem proceeding. *Id.* at ----, 118 S.Ct. at 1467. In *Deep Sea Research,* the Supreme Court rejected California's assertion of Eleventh Amendment immunity from an in rem admiralty action. *Id.* The Supreme Court held that the Eleventh Amendment does not bar an in rem admiralty action where the state does not have actual possession of the res:

> Based on longstanding precedent respecting the federal courts' assumption of *in rem* admiralty jurisdiction over vessels that are not in the possession of a sovereign, we conclude that the Eleventh Amendment does not bar federal jurisdiction over the *Brother Jonathan* and, therefore, that the District Court may adjudicate DSR's and the State's claims to the shipwreck.

Id. at ----, 118 S.Ct. at 1473.

Although this admiralty limitation proceeding is not an

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[4]Although the language of the Eleventh Amendment literally applies only to "any suit in law or equity," the Supreme Court has interpreted the Amendment's restrictions to include federal maritime jurisdiction. *Deep Sea Research,* --- U.S. at ----, 118 S Ct. at 1471.

in rem action, it is sufficiently analogous for *Deep Sea Research* to compel the conclusion that Florida is not entitled to sovereign immunity. Like an in rem proceeding, the plaintiffs in the limitation proceeding neither named any specific entities as defendants in their complaints nor formally served process on any defendants.[5] Instead, the plaintiffs posted security bonds with the district court in the amount of their maximum liability and the district court notified potential claimants to make their claims on the res deposited with the district court.[6] As in *Deep Sea Research,* Florida does not have possession of the disputed res—the bonds are part of the record of this case, currently in the possession of the federal judiciary. Accordingly, we hold that Florida is not entitled to Eleventh Amendment immunity from the limitation proceeding.

B. *Whether Rule F Applies to Claims Brought Pursuant to OPA 90*

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[5]Although Rule F(2) requires that the complaint list all law suits pending against the vessel owner, the complaint does not name the plaintiffs in those cases as defendants in the limitation proceeding. Instead, all claimants must enter the limitation proceeding on their own initiative by filing and serving a claim in accordance with Rule F(5).

[6]The Limitation Act substantively alters the claimants' common law and general maritime remedies—upon proof that the Owners are entitled to limit their liability, the Owners are effectively exonerated of in personam liability beyond the value of the vessel and pending freight. The Limitation Act therefore preempts all other general maritime and common law causes of action against the Owners outside of this limitation proceeding. Indeed, if Florida were immune from this proceeding, Florida would have no remedy at all for its general maritime and common law claims.

Rule F does not specify the limitation statutes to which it applies. *See* Rule F(1). The Owners contend that Rule F generally applies to all limitation statutes. The Owners argue that OPA 90 is a limitation statute insofar as it limits the Owners' liability to $1,200 per gross ton for cleanup costs and natural damages, and that the OPA 90 claims against them therefore must be resolved in a Rule F limitation proceeding.[7] More specifically, the Owners assert that there are two sets of limited funds that must be distributed among valid claims arising from the collision: (1) a set of funds, each equal to the value of the respective vessel, to be distributed pro rata among all valid maritime and common law claims subject to the Limitation Act; and (2) a set of funds, each equal to $1,200 per gross ton for the respective vessel, to be distributed pro rata among all valid OPA 90 claims. Therefore, the Owners contend, Rule F should apply to OPA 90 claims to the same extent it applies to claims subject to the Limitation Act. We disagree.

OPA 90 is not subject to Rule F for two reasons: (1) OPA 90 claimants do not face a limited fund necessitating a pro rata distribution; and (2) Congress has specifically set forth procedures to implement the strictures of OPA 90.

First, the Owners' theory is based on a false premise. OPA 90 claimants do not face a limited fund because OPA 90 uses the Oil Spill Liability Trust Fund (Fund) to ensure that every claim made pursuant to OPA 90 will be paid in full. 26 U.S.C. § 9509; 33 U.S.C. §§ 2712, 2713. Although OPA 90 limits the liability of the Owners for certain costs and damages

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[7]OPA 90 provides various liability limits, depending on the nature of the accident. 33 U.S.C. § 2704. Although there are no facts of record in this appeal, the parties have proceeded on the assumption that $1200 per gross ton is the applicable limit for each vessel in this case.

arising from the oil spill in this case to $1,200 per gross ton, the Fund backstops the Owners' limited liability and ensures that every valid claim will be paid in full.[8] Accordingly, while OPA 90 is a limitation statute in some sense (i.e., it limits the ship owner's liability), it is not a limitation statute in the relevant sense—it does not limit the total amount of money that can be recovered by the claimants in this case. There is no need to bring all of the claimants into a single proceeding to make a pro rata distribution because every claim will be paid in full.

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[8]The Owners argue that OPA 90 does create a limited fund because the maximum amount that may be paid by the Fund with respect to any single incident is $1 billion. *See* 26 U.S.C. § 9509(c)(2)(A)(i). There has been no allegation that the claims in this case pose any danger of exceeding the $1 billion cap. Even if OPA 90 were judicially analogous to the Limitation Act and therefore subject to Rule F, this Circuit does not require claimants to proceed in a Rule F limitation proceeding absent the real possibility that some claims will not be paid:

> Courts have attempted to give effect to both the Limitation Act and the saving to suitors clause whenever possible, by identifying two sets of circumstances under which the damage claimants must be allowed to try liability and damages issues in a forum of their own choosing. The first circumstance arises where the limitation fund exceeds the aggregate amount of all the possible claims against the vessel owner. In such a case, the vessel owner is not exposed to liability in excess of the limitation fund, and thus the vessel owner's rights under the Limitation Act are not implicated.

Beiswenger, 86 F.3d at 1037 (citations omitted).

Second, OPA 90 is not subject to Rule F because, whereas the Limitation Act was enacted without procedural mechanisms, Congress expressly set forth procedures for implementing OPA 90. In reaching the same conclusion, the First Circuit summarized the claims procedures set forth in OPA 90:

> The OPA requires all claims for removal costs or damages to be presented first to the responsible party or guarantor. If the responsible party denies liability or the claim is not settled within 90 days, the claimant may proceed against the responsible party in court or present the claim to the Fund. In some enumerated instances, claims may be presented directly to the Fund without first presenting them to the responsible party. The purpose of the claim presentation procedure is to promote settlement and avoid litigation.

MetLife Capital Corp. v. M/V EMILY S., 132 F.3d 818, 824 (1st Cir.1997) (internal citations and quotations omitted), *cert. denied*, --- U.S. ----, 118 S.Ct. 2367 (1998). Unlike the Limitations Act, OPA 90 can accomplish its statutory goals without the assistance of Rule F.

This conclusion is supported by principles of statutory construction. Comparing the OPA 90 statutory procedures with the Rule F procedures reveals two largely conflicting frameworks for resolving OPA 90 claims. For example, OPA 90 gives claimants three years to bring claims against a responsible party. 33 U.S.C. § 2717(f). OPA 90 also requires that claimants first present their claims to the responsible party, and then, if a claim is not settled within the requisite period of time, the claimant may proceed in court. 33 U.S.C. § 2713(a), (c). In some instances, claimants may proceed directly to the OPA Fund and then subrogate to the United States the claims against the

responsible party. 33 U.S.C. § 2715. If OPA 90 claims were subject to Rule F, every claim (including claims subrogated to the United States) would have to be brought within the period announced by the district court in the notice sent to potential claimants, which was 60 days in this case. Subjecting OPA 90 claims to Rule F effectively would allow ship owners to opt out of the Congressionally mandated procedures for resolving OPA 90 claims. Additionally, the venue provisions of OPA 90 permit claimants to proceed "in any district in which the discharge or injury or damages occurred, or in which the defendant resides, may be found, has its principal office, or has appointed an agent for service of process." 33 U.S.C. § 2717(b). The injunction issued by the district court in a Rule F proceeding would require OPA 90 claimants to proceed only in the district court chosen by the vessel owners, and the process envisioned by OPA 90's jurisdiction and venue provisions would be rendered meaningless. Similarly, OPA 90 grants jurisdiction to state courts to hear claims arising thereunder. 33 U.S.C. § 2717(c). This grant of concurrent jurisdiction would be rendered meaningless if OPA 90 claims were subject to Rule F because Rule F complaints must be filed in federal court. *MetLife*, 132 F.3d at 822.[9]

In resolving the conflict between the Rule F procedures

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[9]The Owners assert that this conflict of procedures is no different than the conflict that occurs when Jones Act claims are required to be brought in a Rule F limitation proceeding (e.g., the 3-year statute of limitations normally enjoyed by Jones Act claimants is replaced with the shorter period announced pursuant to Rule F). While it is true that Rule F procedures govern in the small percentage of Jones Act cases that implicate the liability limits of the Limitation Act, the Owners' theory would subject every OPA 90 claim to Rule F, giving ship owners the option to replace OPA 90's 3-year statutory period in every case.

and the OPA 90 procedures, a fundamental principle of statutory construction requires that we apply the more specific procedures.[10] *San Pedro v. United States,* 79 F.3d 1065, 1069 (11th Cir.) ("We therefore follow the principle, upheld by the Supreme Court on numerous occasions, that a specific statute takes precedence over a more general one."), *cert. denied,* --- U.S. ----, 117 S.Ct. 431, 136 L.Ed.2d 330 (1996). Furthermore, we avoid statutory constructions that render provisions meaningless. *Woodfork v. Marine Cooks & Stewards Union,* 642 F.2d 966, 970-71 (5th Cir. Apr.1981)[11] ("A basic principle of statutory construction is that a statute should not be construed in such a way as to render certain provisions superfluous or insignificant." (internal quotations and citations omitted)). Consistent with these principles of statutory construction, OPA 90 claims must be resolved pursuant to the procedures contained in that statute, rather than replacing those procedures with Rule F.

The Owners argue that Rule F must be applied to preserve judicial resources and avoid the burden of defending a multiplicity of suits in various fora. The Owners' understandable interest in consolidating this potentially unwieldy litigation does not overcome the Congressionally mandated procedures for adjudicating OPA 90 claims. This Circuit does not view the convenience of the shipowner as a legitimate goal of a Rule F

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[10]Although the Supplemental Rules for Certain Admiralty and Maritime Claims are not part of a Congressionally-enacted statute, the decision whether to apply those rules or the more specific procedures contained in OPA 90 is informed by general principles of statutory construction.

[11]In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

limitation proceeding:

> Absent an insufficient fund (1) the statutory privilege of limiting liability is not in the nature of a *forum non conveniens* doctrine, and (2) the statute gives a ship-owner, sued in several suits no advantage over other kinds of defendants in the same position. Concourse is to be granted only when necessary in order to distribute an inadequate fund. The purpose of limitation proceedings is not to prevent a multiplicity of suits but, in an equitable fashion, to provide a marshalling of assets—the distribution pro rata of an inadequate fund among claimants, none of whom can be paid in full.

Pershing Auto Rentals, Inc. v. Gaffney, 279 F.2d 546, 550-51 (5th Cir.1960) (internal citations and quotations omitted). Furthermore, neither Rule F not the Limitation Act grants the Owners a right to a concursus. Rule F merely provides a procedure for distributing a limited fund among competing claimants where the real possibility exists that some claims will not be paid in full:

> [W]here the value of the vessel and the pending freight, the fund paid into the proceeding by the offending owner, exceeds the claims made against it, there is no necessity for the maintenance of the concourse....
>
> For us to expand the jurisdictional provisions of the Act to prevent respondent from now proceeding in her state case would transform the Act from a protective instrument to an offensive weapon by which the shipowner could

> deprive suitors of their common-law rights, even where the limitation fund is known to be more than adequate to satisfy all demands upon it. The shipowner's right to limit liability is not so boundless. The Act is not one of immunity from liability but of limitation of it and we read no other privilege for the shipowner into its language over and above that granting him limited liability.

Lake Tankers Corp. v. Henn, 354 U.S. 147, 152-53, 77 S.Ct. 1269, 1272, 1 L.Ed.2d 1246 (1957).[12]

Rule F is designed to distribute a limited fund to multiple claimants where Congress has provided no statutory procedure for that distribution and where all claims cannot be paid in full. This case satisfies neither of these requirements—Congress has provided a procedure for implementing OPA 90 and the Fund will guarantee full payment of all valid OPA 90 claims arising from this oil discharge.

C. *Whether Rule F Applies to Claims Brought Pursuant to the Florida Act*

OPA 90 authorizes states to adopt liability laws for oil spills and exempts those laws from the provisions of the Liability Act. 33 U.S.C. § 2718. Accordingly, the Florida Act is neither

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[12]The Owners argue that the affirmative defense of limited liability will not work if multiple actions proceed in different courts. We disagree. OPA 90 establishes a limit of liability for the Owners. After paying out that amount, no cause of action will lie against the Owners pursuant to OPA 90. The remaining claims (or the remaining portions of claims) will be paid from the Fund.

subject to the Limitation Act's provisions nor otherwise preempted. We will not impose Rule F on the Florida Act because, like OPA 90 claimants, Florida Act claimants do not face a limited fund. The Florida Act establishes the Florida Coastal Protection Trust Fund (Florida Fund) to ensure that all claims are paid in full despite the limitation of liability enjoyed by responsible parties. Fla. Ch. 376.11. Moreover, as discussed in the previous section of this opinion, the Owners do not have a general entitlement to a concursus; Rule F is not designed to make litigation more convenient for vessel owners.

Furthermore, the Florida Act sets forth an elaborate set of claims procedures to guide the administration of claims against responsible parties and against the Florida Fund. Fla. Stat. ch. 376.123. Rule F was designed to correct a procedural void in a federal law. Florida has left no such void in its liability scheme.

IV. CONCLUSION

In light of *Deep Sea Research,* the district court erred in ruling that Florida is entitled to Eleventh Amendment immunity from the limitation proceeding. The district court correctly dismissed without prejudice the claims brought against the Owners under OPA 90 and the Florida Act.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
IN ADMIRALTY

TUG CAPT. FRED BOUCHARD CORP.
et al.,
Plaintiffs,

CONSOLIDATED CASE NOS.
93-1321-CIV-T-23B
93-1326, 93-1363,
93-1366, 93-1399

v.

M/V BALSA 37 etc., et al.,
Defendants.
_____/

IN THE MATTER OF THE COMPLAINT OF
MARITRANS OPERATING PARTNERS LP

[CASE NO. 94-227-CIV-T-23B]

and MARITRANS GENERAL PARTNER, INC.
FOR EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF THE TUG
SEAFARER, Official No. 532672 and
BARGE OCEAN 255, Official No. 534910
_____/

IN THE MATTER OF THE COMPLAINT OF
BOUCHARD TRANSPORTATION CO., INC.,

[CASE NO. 94-233-CIV-T-23B]

TUG CAPTAIN FRED BOUCHARD, INC., AND
B. NO. 155 CORPORATION, FOR
EXONERATION FROM OR LIMITATION OF
LIABILITY AS OWNER OR AS OWNER PRO
HAC VICE OF TUG CAPT. FRED BOUCHARD
AND BARGE B. NO. 155

_____/

ORDER

Several claimants (i.e., United States, Florida Department of Environmental Protection, the purported "Updegraff class," and the purported "Boca Ciege Hotel, Inc., class") move to dismiss (Case No. 93-1399, Docs. 50-1, 50-2, 65-1, 65-2, 108-1, and 108-2; Case No. 94-227, Docs. 16, 88, 112, and 175; Case No. 94-233, Docs. 19, 78, 100, and 172) these limitation actions as to their claims pursuant to the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-19, and Florida's Pollutant Discharge Prevention and Control Act, Fla. Stat. §§ 376.011-.21. Upon consideration, the motions are **GRANTED**. See In re Jahre SPRAY II K/S, 1996 WL 451315 (D.N.J. August 5, 1996). Neither OPA, Supplemental Rule F, nor their legislative history unequivocally suggest that the claimants are required to lodge their oil spill claims exclusively in these concursus proceedings, regardless of whether the resolution of those claims would be governed by the substantive provisions contained in the applicable statute. To the contrary, a disinterested reading of the materials cited by the parties leads to the troublesome conclusion that the claimants may assert those claims independent of these proceedings.

Florida Department of Environmental Protection's motions to dismiss (Case No. 94-227, Docs. 111 and 152; Case No. 94-233, Docs. 99 and 139) based on the Eleventh Amendment are **GRANTED**. The vessel owners rely almost exclusively on In re Sand Bar I, Inc., 1993 A.M.C. 1312 (E.D. La. 1992) and In re Abaco Treasure Ltd., 1993 A.M.C. 1976 (S.D. Fla. 1993). However those cases embrace a legal fiction that fails to withstand scrutiny under recent Eleventh Circuit and Supreme Court decisions (cited by the DEP) that expound Eleventh Amendment jurisprudence. See, e.g., Seminole Tribe of Florida v. Florida, ___ U.S. ___, 116 S.Ct. 114 (1996); see also

In re Williamson Towing Co. Inc., 534 F.2d 758 (7th Cir. 1976). Further, Sand Bar I, Inc. specifically rejects the vessel owners' principal argument that the DEP "waived" its right to immunity by filing in these actions affirmative claims for relief. 1993 A.M.C. at 1313 n. 1. The DEP's decision to file those claims was far from voluntary--it was mandated by this Court's order requiring all claimants to file their claims or face default.

Accordingly, the injunctions issued in these limitation proceedings shall not apply (1) to the claims brought by the DEP, under any theory, for pollution removal costs and damages as described in the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-19, and Florida's Pollutant Discharge Prevention and Control Act, Fla. Stat. §§ 376.011-.21, (2) to the claims brought by the remaining claimants pursuant to either the Oil Pollution Act of 1990, 33 U.S.C. §§ 2701-19, or Florida's Pollutant Discharge Prevention and Control Act, Fla. Stat. §§ 376.011-.21, or (3) to the claims brought by the United States pursuant to either the clean Water Act, 33 U.S.C. §§ 1251-1376 or the Rivers and Harbors Act, 33 U.S.C. §§ 401-67.[13] The claimants are

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1. The vessel owners raise significant and legitimate concerns regarding prejudice, inconsistent rulings, judicial economy, splitting of claims, unnecessary expenditure of resources, and the like. They advanced those concerns with skill and determination. I concede that I experience a degree of uneasiness with the effect of today's ruling. As I announced at the conclusion of oral argument, this is one of those instances when the result that makes the most sense (and the result that perhaps ought to be pursued) is either inconsistent with or not permitted by a combination of the prevailing law and the parties. Perhaps the Eleventh Circuit will disagree with my view or the legislative and judicial bodies responsible for promulgating the governing statutes and rules will provide some clarity and guidance. Both the effect of this order and these limitation

permitted to withdraw the claims subject to this order. All other claims shall remain. The counterclaims against the DEP are dismissed without prejudice.

ORDERED in Tampa, Florida, on October 22, 1996.

s/s
Steven D. Merryday
United States District Judge

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actions (as they pertain to the moving claimants) are STAYED pending the resolution of any appeals.

At the September 10, 1996, status conference, the vessel owners informed the court that they intend to proffer to the DEP and the United States a "global" settlement that would resolve the asserted claims. Pursuant to 11th Cir. r. 33-1(c), the Eleventh Circuit may wish to conduct a settlement conference. As a skilled facilitator possessing significant knowledge about the issues raised in these proceedings, Peter J. Grilli is a candidate worthy of serving as the conference attorney.

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT OF
BOUCHARD TRANSPORTATION CO., INC.,
TUG CAPTAIN FRED BOUCHARD INC.,
AND B NO. 155 CORPORATION, FOR

[CASE NO. 94-233-CIV-T-23B]

EXONERATION FROM OR LIMITATION OF
LIABILITY AS OWNER OR AS OWNER
PRO HAC VICE OF TUB CAPT. FRED
BOUCHARD AND BARGE B. NO. 155.
_____/

BOUCHARD'S ANSWER AND COUNTERCLAIM TO THE CLAIM OF THE STATE THROUGH ITS AGENCY THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

Limitation Plaintiffs, BOUCHARD TRANSPORTATION CO., INC,; TUG CAPTAIN FRED BOUCHARD INC,; and B NO 155 CORPORATION (collectively "Bouchard"), answer and counterclaim to the Claim of the Florida Department of Environmental Protection ("DEP") as follows:

ANSWER

[Answers and Defenses omitted]

COUNTERCLAIM

Limitation Plaintiff / Counter-Claimants, BOUCHARD TRANSPORTATION CO., INC; TUG CAPTAIN FRED BOUCHARD INC,; and B NO 155 CORPORATION (collectively "Bouchard"), pursuant to Fed. R. Civ. P. 13, counterclaim against the State of Florida and allege upon information and belief as follows:

1. This is an admiralty and maritime claim as contemplated by Fed. R. Civ. P. 9(h), within the jurisdiction of this Court pursuant to 28 U.S.C. §§ 1331 and 1333.

2. The State of Florida has waived its sovereign immunity and the sovereign immunity of its agencies by DEP's filing a Claim in this lawsuit and legislatively under Fla. Stat. § 768.14 (1993) and other applicable statutes or laws.

3. At all material times the Bouchard companies were corporations organized and existing under the laws of the State of New York with their principal places of business in the State of New York.

4. At all material times BOUCHARD TRANSPORTATION CO., INC., was operator and / or demise owner of the Tug CAPT. FRED BOUCHARD and the Barge B. NO. 155; TUG CAPTAIN FRED BOUCHARD, INC. was the registered owner of the Tug. CAPT FRED BOUCHARD; and B NO. 155 CORPORATION was the registered owner of Barge B. NO. 155.

5. Tug CAPT. FRED BOUCHARD, official number 644119, is a tug boat 119.5 feet in length and was built in 1981.

6. Barge B. NO. 155, official number 603622, is a

tank barge of 9262 gross tons, 446 feet in length and was built in 1979.

7. CAPT. FRED BOUCHARD and B. NO. 155 were at all material times in all respects seaworthy, properly manned, and in proper working condition and, in particular, were so on August 10, 1993.

8. On August 10, 1993, while proceeding out bound on Tampa Bay the MV BALSA 37 came into violent collision with in-bound Barge OCEAN 255, which was being pushed by Tug SEAFARER, and then with in-bound Barge B. NO. 155, which was being pushed by Tug CAPT. FRED BOUCHARD, resulting in damage to the vessels, a spill of a portion of OCEAN 255's and B. NO. 155's cargo of petroleum products, and other losses.

COUNT I
NEGLIGENCE / GROSS NEGLIGENCE

Bouchard realleges the allegations of paragraph 1 through 8 of this counterclaim and further alleges as follows:

9. The State of Florida has a duty to assure that the individuals it licenses as pilots are competent.

10. Baggett has been convicted of one or more criminal offenses in the State of Florida.

11. The State of Florida failed to conduct an evaluation of Baggett's fitness given his criminal conviction(s) before issuing or continuing his pilot's license.

12. Driving a motor vehicle while intoxicated or under the influence of alcohol is indicative of a lack of the necessary judgment required for a pilot's license.

13. Convictions for driving a motor vehicle while intoxicated or under the influence of alcohol, or other alcohol related offenses, reflect unfavorably upon an individual's fitness to be entrusted with the duties and responsibilities of a pilot's license.

14. Baggett was twice convicted for driving a motor vehicle while under the influence of alcohol or other alcohol related offenses.

15. Baggett's driver's license was suspended on two other occasions for refusal to take a breath /urine / blood test.

16. In addition to the foregoing, Baggett was twice charged with driving a motor vehicle while intoxicated which charges were reduced to reckless driving.

17. The State of Florida knew, or is charged with knowledge, of Baggett's convictions for driving a motor vehicle under the influence and other alcohol related offenses.

18. The State of Florida knew, or is charged with knowledge, that it was reported that Baggett has piloted in Tampa Bay, Florida while intoxicated. See Baggett v. Department of Professional Regulation, 717 F.2d 521 (11th Cir. 1983).

19. Despite the knowledge that Baggett had numerous convictions and driver's license suspensions for driving a motor vehicle while under the influence or other alcohol related offenses, and that Baggett was reported to have piloted a vessel while intoxicated, the State of Florida failed to conduct an investigation and evaluation of Baggett's fitness to obtain and retain a pilot's license or obtain evidence of rehabilitation.

20. To employ a mariner with a known record of drunk driving, DWI / DUI, or other alcohol related offenses in a safety sensitive position, such as a pilot, without monitoring that individual for continued alcohol use is grossly negligent. See United States v. Exxon Corp., et al., U.S.D.C. Alaska, Cr. Nos. A90-015-1, A90-015-2, Bill of Particulars, dated April 18, 1990.

21. The State of Florida knew that Baggett would be employed as an independent contractor or under compulsion of law and therefore that a marine employer would not be in a position to monitor and evaluate his continued fitness for employment as a pilot aboard vessels.

22. Baggett has been the subject of at least 23 complaints recorded by the State of Florida Department of Professional Regulation since 1982 and an additional undetermined number of complaints received by the United States Coast Guard.

23. The State of Florida was aware of Baggett's record of involvement in marine casualties while acting as a pilot in Tampa Bay.

24. Despite knowledge of Baggett's piloting record, the State of Florida never required a demonstration of Baggett's competence to continue to hold a pilot's license.

25. Despite knowledge of Baggett's piloting record, the State of Florida never required any additional training to enhance his skills or assure his competence to hold a pilot's license.

26. Because the State of Florida was aware that, as a pilot, Baggett would not be subject to the supervision of any marine employer who would be required to take adequate

measures to assure his fitness to operate vessels, the State of Florida owed a duty to assure his competence before issuing, and continuing to permit Baggett to possess, a pilot's license.

27. Baggett, by virtue of his criminal convictions, history of alcohol related motor vehicle driving offenses, history of marine casualties, and poor physical condition was unfit to obtain and retain a state pilot's license.

28. Baggett's presence on Tampa Bay as a pilot constituted an immediate and serious danger to the health, safety, and welfare of the public.

29. A private marine employer who employed Baggett to operate vessels in Tampa Bay, in light of his record of alcohol related offenses and his record of involvement in marine casualties, would be grossly negligent and / or guilty of willful misconduct in employing Baggett if it failed to take any measures to monitor his continued fitness for employment.

30. The State of Florida's act of licensing Baggett to operate vessels in Tampa Bay, and failure to take any measures to evaluate or assure his continued fitness to operate vessels as a pilot constitutes gross negligence and / or willful misconduct.

31. On August 10, 1993, Baggett while acting as pilot, operated the M/V BALSA 37 in a grossly negligent manner, causing the M/V Balsa 37 to collide with the Barge OCEAN 255 and the Barge B. NO. 155.

32. As a result of the fault, gross negligence or willful misconduct of the State of Florida, Baggett was permitted to operate the M/V BALSA 37 in a grossly negligent manner, causing the collisions.

33. Based on Baggett's demonstrated lack of competence, his record of marine casualties, record of alcohol related offenses, and poor physical condition, the collisions were foreseeable.

34. As a direct and proximate result of the fault, gross negligence or willful misconduct by the State of Florida, a quantity of oil was discharged into the waters of Tampa.

35. As a direct and proximate result of the fault, gross negligence or willful misconduct by the State of Florida, the Barge B. NO. 155 suffered damage in excess of $1,000,000.

36. By reason of the aforesaid collisions, Bouchard has sustained damages in excess of SEVENTY-FIVE MILLION DOLLARS ($75,000,000.00), as nearly as can be presently ascertained, including, but not limited to, costs of temporary and permanent repairs to Barge B. NO. 155 and Tug CAPT. FRED BOUCHARD, or alternatively the actual or constructive total loss of said vessels; the loss of use of said vessels during repairs; loss of and damage to the cargo carried on board Barge B. NO. 155; pollution containment and clean-up expenses relating to petroleum products that may have been spilled from the Barge B. NO. 155 or other vessels involved in the casualty including the Barge OCEAN 255; personal injuries; salvage expenses; emergency services and expenses including the costs of fire fighting and rescue services; survey, inspection, and classification society fees and expenses; attorneys fees in connection with defending claims by third parties; increased premiums; and other incidental expenses proximately incurred as a result of the collisions for which claim is now made.

WHEREFORE, Bouchard demands judgment against the State of Florida for Bouchard's damages with interest thereon at the legal rate from the date of the aforesaid collisions,

Bouchard's costs and disbursements herein, a reasonable attorney's fee, and such other and further relief as may be just in the premises.

COUNT II
INDEMNITY

Bouchard realleges the allegations of paragraphs 1 through 36 and further alleges upon information and belief as follows:

37. As a result of the aforesaid collision Bouchard has been sued or claimed against in this limitation case and in the following proceedings:

a. Boca Ciega Hotel, Inc. v. Bouchard Transportation Co., pending in this court as Case No. 93-1616-CIV-T-17C.

b. Updegraff v. Bouchard Transportation Co., Inc., pending in this court as Case No. 94-167-CIV-T-17A.

c. In re Complaint of Tsacaba Shipping Co., etc., pending in this court as Case No. 93-1399-CIV-T-23C.

d. Bouchard Transportation Co., Inc., etc. v. Salamanca, etc., pending in this court as Case No. 93-1363-CIV-T-23C.

38. In addition to the lawsuits mentioned in the immediately preceding paragraph Bouchard anticipates other claims and lawsuits, and numerous claims have been submitted to Bouchard via its claims service, Turnaboat Services, Ltd.

39. Any liability that may be assessed against

Bouchard in the aforesaid lawsuits, actions, and claims will be solely technical or vicarious liability and will not be based on any fault of Bouchard or unseaworthiness of its vessels but will be based on the negligence, gross negligence, or otherwise tortious conduct of the State of Florida and its agencies.

40. Bouchard has been required to retain the services of the undersigned attorneys and has agreed to pay them a reasonable fee.

41. Pursuant to the general maritime law and to 33 U.S.C. §§ 1321 (h) and 2709, Bouchard is entitled to indemnity from the State of Florida in connection with any and all liability that may be assessed against Bouchard as a result of the aforesaid collision and resulting oil spill.

WHEREFORE, Bouchard demands judgement against the State of Florida for indemnity as to any amounts for which Bouchard may be held liable to third parties, with its costs, interest at the legal rate from the date of the aforesaid collision, a reasonable attorney's fee, trial by jury of all issues so triable, a reasonable attorney's fee, and such other and further relief as may be just in the premises.

COUNT III
CONTRIBUTION

Bouchard realleges the allegations of paragraphs 1 through 41 and further alleges upon information and belief as follows:

42. If any liability should be assessed against Bouchard in the aforesaid lawsuits, actions, and claims, Bouchard will be entitled to contribution from the State of Florida for any such liability based on the percentage of fault

arising out of the State's gross negligence and negligence.

43. Pursuant to the general maritime law and to 33 U.S.C. §§ 1321 (h) and 2709, Bouchard is entitled to contribution from the State of Florida in connection with any and all liability than may be assessed against Bouchard as a result of the aforesaid collision and resulting oil spill.

WHEREFORE, Bouchard demands judgment against the State of Florida for contribution to any amounts for which Bouchard may be held liable to third parties, with its costs, interest at the legal rate from the date of the aforementioned collision, a reasonable attorney's fee, trial by jury of all issues so triable, a reasonable attorney's fee, and such other and further relief as may be just in the premises.

COUNT IV
PUBLIC NUISANCE

Bouchard realleges the allegations of paragraphs 1 through 43 of this counterclaim and further alleges:

44. The State of Florida has assumed the responsibility to protect to the fullest extent possible the resources, environment, life, and property in the State of Florida as they are affected by the piloting of vessels utilizing the navigable waters of the State, and to that end regulates and licenses pilots.

45. The State of Florida has a duty to assure that a person it licenses to pilot vessels is competent to perform that function.

46. A vessel is rendered unseaworthy if it is under the direction of an incompetent pilot.

47. Baggett was an incompetent pilot.

48. The M/V BALSA 37 and every other vessel under Baggett's direction and control was unseaworthy.

49. By licensing, renewing the license, and continuing to permit the license of pilot Baggett without adequate requirement of training, competency, disciplinary oversight, and investigation, and failing to revoke the license the State of Florida was guilty of gross negligence and / or willful misconduct which resulted in significant interference with the public health and safety and created a public nuisance which directly caused the collisions and special and peculiar damages to Bouchard consisting inter alia of physical damage to its vessel, personal injuries to its personnel, and the other damages listed in paragraph 36 of this counterclaim.

50. Despite its knowledge of its own regulations, its statutory duties and authorities, Baggett's criminal record, Baggett's driving record, and Baggett's manifest incompetence as reflected by his piloting record, and his poor physical condition, the State of Florida and its Board failed to abate the public nuisance that it had created in Tampa Bay.

51. The State of Florida was uniquely in a position to abate this public nuisance by, inter alia, any or all of the following:

(a) revoking Baggett's pilot's license;

(b) monitoring and supervising his performance as a pilot;

(c) Monitoring his behavior to assure that his judgment, as reflected by his inappropriate use of alcohol, was

commensurate with the duties and responsibilities of one acting as a vessel pilot in Tampa Bay;

(d) requiring Baggett to undergo additional training; and / or

(e) requiring Baggett to demonstrate his competence before being allowed to continue to pilot vessels on Tampa Bay.

WHEREFORE, Bouchard demands judgment against the State of Florida for damages with interest thereon at the legal rate from the date of the aforesaid collisions, Bouchard's costs and disbursements herein, a reasonable attorney's fee, and such other and further relief as may be just in the premises.

COUNT V
RECOUPMENT / SET-OFF

Bouchard realleges the allegations of paragraphs 1 through 51 of this counterclaim and further alleges:

52. The State of Florida has claimed damages against Bouchard for, inter alia, alleged clean-up costs, administrative costs, third party claims costs, compensation for damages to natural resources, abatement costs, third party claims, subrogation, removal costs, lost revenues and profits, damage to real and personal property, costs associated with assessment of damages to natural resources, costs of restoration and rehabilitation of the natural resources, interest, and attorneys fees.

53. Bouchard's claims arise out of the same occurrence which is the subject matter of the claim of the State of Florida and Bouchard incurred damages and removal costs and paid claims of third parties.

WHEREFORE, Bouchard claims recoupment or set-off of its damages against any damages recoverable by the State of Florida.

COUNT VI -
UNJUST ENRICHMENT

Bouchard realleges the allegations of paragraphs 1 through 53 of this counterclaim and further alleges:

54. The State of Florida claims to be a natural resource trustee for natural resources existing within the State of Florida.

55. The collisions resulted in a discharge of oil into the waters of Tampa Bay.

56. The collisions were caused by the gross negligence and / or willful misconduct of the State of Florida.

57. As a result of the collisions and discharge of oil, Bouchard expended monies to clean-up the oil, to mitigate damage to the natural resources of the State of Florida, and to restore natural resources of the State of Florida.

58. The State of Florida has been unjustly enriched by having certain of its pollution clean-up duties and other duties performed on its behalf and for its account by and at the expense of Bouchard.

WHEREFORE, Bouchard demands judgment against the State of Florida for Bouchard's damages with interest thereon at the legal rate from the date of the aforesaid collision, Bouchard's costs and disbursements herein, a reasonable attorney's fee, and such other and further relief as may be just in the premises.

COUNT VII
SUBROGATION

Bouchard realleges the allegations of paragraphs 1 through 58 and further alleges:

59. Bouchard has paid and / or will pay claims of third parties for removal costs and / or damages arising out of the discharge and collisions.

60. Bouchard is subrogated to the interests of those third parties.

WHEREFORE, Bouchard demands judgment against the State of Florida for Bouchard's damages with interest thereon at the legal rate from the date of the aforesaid collisions, Bouchard's costs and disbursements herein, a reasonable attorney's fee, and such other and further relief as may be just in the premises.

COUNT VIII
CLAIM AGAINST THE FLORIDA
COASTAL PROTECTION TRUST FUND

Bouchard realleges the alleged allegations of paragraphs 1 through 60 and further alleges:

61. Bouchard has suffered damages as a direct result of a discharge of pollutants prohibited by Fla. Stat. § 376.041.

62. Bouchard has paid cleanup costs in excess of its limitation of liability pursuant to Fla. Stat. § 376.12, in addition to other damages resulting directly from a discharge of pollutants.

63. Bouchard is entitled to limit its liability pursuant to Fla. Stat. § 376.12.

64 Bouchard is entitled to receive reimbursement from the Florida Coastal Protection Trust Fund in the amount of said cleanup costs and other damages in excess of its limitation of liability amount.

WHEREAS, Bouchard demands judgment against the State of Florida Coastal Protection Trust Fund for damages and interest thereon at the legal rate from the date of the aforesaid collisions, Bouchard's costs and disbursements herein, a reasonable attorney's fee, and such and further relief as may be just in the premises.

[Certificate of Service omitted]

APPENDIX D

UNITED STATES CODE ANNOTATED
TITLE 46 APPENDIX. SHIPPING
CHAPTER 8--LIMITATION OF VESSEL OWNER'S LIABILITY

§181. Liability of masters as carriers

If any shipper of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or timepieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel, or package, or trunk, shall lade the same as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered.

§182. Loss by fire

No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is

caused by the design or neglect of such owner.

§183. Amount of liability

(a) Privity or knowledge of owner; limitation

The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) Seagoing vessels; losses not covered in full

In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $420 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $420 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) Tonnage of seagoing vessels

For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a

seagoing sailing vessel shall be her registered tonnage: Provided, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) Loss of life or bodily injury arising on distinct occasions

The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) Privity imputed to owner

In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) "Seagoing vessel" defined

As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title.

(g) Vicarious liability for medical malpractice at shoreside facilities; statutory limitations

In a suit by any person in which the operator or owner of a vessel or employer of a crewmember is claimed to have vicarious liability for medical malpractice with regard to a crewmember occurring at a shoreside facility, and to the extent the damages resulted from the conduct of any shoreside doctor, hospital, medical facility, or other health care provider, such operator, owner, or employer shall be entitled to rely upon any and all statutory limitations of liability applicable to the doctor, hospital, medical facility, or other health care provider in the State of the United States in which the shoreside medical care was provided.

§183c. Stipulations limiting liability for negligence invalid; certain exceptions regarding infliction of emotional distress, etc.

(a) Negligence

It shall be unlawful for the manager, agent, master, or owner of any vessel transporting passengers between ports of the United States or between any such port and a foreign port to insert in any rule, regulation, contract, or agreement any provision or limitation (1) purporting, in the event of loss of life or bodily injury arising from the negligence or fault of such owner or his servants, to relieve such owner, master, or agent from liability, or from liability beyond any stipulated amount, for such loss or injury, or (2) purporting in such event to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss or injury, or the measure or damages therefor. All such provisions or limitations contained in any such rule, regulation, contract, or agreement are declared to be against public policy and shall be null and void and of no effect.

(b) Infliction of emotional distress, mental suffering, or

psychological injury

(1) Subsection (a) of this section shall not prohibit provisions or limitations in contracts, agreements, or ticket conditions of carriage with passengers which relieve a crewmember, manager, agent, master, owner, or operator of a vessel from liability for infliction of emotional distress, mental suffering, or psychological injury so long as such provisions or limitations do not limit such liability if the emotional distress, mental suffering, or psychological injury was--

(A) the result of physical injury to the claimant caused by the negligence or fault of a crewmember or the manager, agent, master, owner, or operator;

(B) the result of the claimant having been at actual risk of physical injury, and such risk was caused by the negligence or fault of a crewmember or the manager, agent, master, owner, or operator; or

(C) intentionally inflicted by a crewmember or the manager, agent, master, owner, or operator.

(2) Nothing in this subsection is intended to limit the liability of a crewmember or the manager, agent, master, owner, or operator of a vessel in a case involving sexual harassment, sexual assault, or rape.

§185. Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or

value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

§186. Charterer may be deemed owner

The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof.

§187. Remedies reserved

Nothing in sections 182, 183, 184, 185 and 186 of this title shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel.

§188. Limitation of liability of owners applied to all vessels

Except as otherwise specifically provided therein, the provisions of sections 182, 183, 183b-187, and 189 of this title shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters.

§192. Limitation of liability for errors of navigation, dangers of the sea and acts of God

If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

APPENDIX E

FEDERAL RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Rule F. Limitation of Liability

(1) Time for Filing Complaint; Security. Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at the owner's option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, the owner's interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. The plaintiff shall also give security for costs and, if the plaintiff elects to give security, for interest at the rate of 6 percent per annum from the date of the security.

(2) Complaint. The complaint shall set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state the voyage if any, on which the demands sought to be limited arose, with the date and place of its termination; the

amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If the plaintiff elects to transfer the plaintiff's interest in the vessel to a trustee, the complaint must further show any prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

(3) Claims Against Owner; Injunction. Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action.

(4) Notice to Claimants. Upon the owner's compliance with subdivision (1) of this rule the court shall issue a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after

issuance of the notice. For cause shown, the court may enlarge the time within which claims may be filed. The notice shall be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior to the date fixed for the filing of claims. The plaintiff not later than the day of second publication shall also mail a copy of the notice to every person known to have made any claim against the vessel or the plaintiff arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice shall be mailed to the decedent at the decedent's last known address, and also to any person who shall be known to have made any claim on account of such death.

(5) Claims and Answer. Claims shall be filed and served on or before the date specified in the notice provided for in subdivision (4) of this rule. Each claim shall specify the facts upon which the claimant relies in support of the claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability the claimant shall file and serve an answer to the complaint unless the claim has included an answer.

(6) Information to be Given Claimants. Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow, the plaintiff shall mail to the attorney for each claimant (or if the claimant has no attorney to the claimant) a list setting forth (a) the name of each claimant, (b) the name and address of the claimant's attorney (if the claimant is known to have one), (c) the nature of the claim, i.e., whether property loss, property damage, death, personal injury etc., and (d) the amount thereof.

(7) Insufficiency of Fund or Security. Any claimant may by motion demand that the funds deposited in court or the security given by the plaintiff be increased on the ground that

they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction. In like manner any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and, after notice and hearing, the court may similarly order that the deposit or security be increased or reduced.

(8) Objections to Claims: Distribution of Fund. Any interested party may question or controvert any claim without filing an objection thereto. Upon determination of liability the fund deposited or secured, or the proceeds of the vessel and pending freight, shall be divided pro rata, subject to all relevant provisions of law, among the several claimants in proportion to the amounts of their respective claims, duly proved, saving, however, to all parties any priority to which they may be legally entitled.

(9) Venue; Transfer. The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; if venue is

wrongly laid the court shall dismiss or, if it be in the interest of justice, transfer the action to any district in which it could have been brought. If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules.

Respectfully submitted,

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October ___. 1998

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No. 98-752

In The

Supreme Court of the United States

October Term, 1998

DEPARTMENT OF ENVIRONMENTAL PROTECTION
of the State of Florida,

Petitioner,

vs.

BOUCHARD TRANSPORTATION COMPANY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Circuit Court Of Appeals For The Eleventh Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Eleventh Amendment allows a state to avoid a district court's resolution of rights to participate in a limitation fund held by the district court in an admiralty limitation of liability proceeding commenced by a vessel owner under Supplemental Rule F.

2. Whether a vessel owner may counterclaim against a state that files a claim against the vessel owner in the vessel owner's limitation of liability proceeding commenced under Supplemental Rule F.

INTERESTED PARTIES

Petitioner's list of parties is incomplete. A complete list of all parties to this litigation appears in the Petition for Writ of Certiorari filed in *Bouchard Transportation Company, Inc., et al., v. United States,* Case No. 98-682, at pp. ii-iii.

This brief is submitted on behalf of the Respondents:

BOUCHARD TRANSPORTATION COMPANY, INC.; TUG CAPTAIN FRED BOUCHARD INC.; and B. NO. 155 CORPORATION. These Respondents have no parent or subsidiary companies.

MARITRANS OPERATING PARTNERS L.P. and MARITRANS GENERAL PARTNER INC. The parent company of these Respondents is MARITRANS INC. There are no subsidiary companies.

TSACABA SHIPPING COMPANY, INC.; HIONG GUAN NAVEGACION CO., LTD.; and DOWA LINE AMERICA CO., LTD. The parent company of HIONG GUAN NAVEGACION CO., LTD. and DOWA LINE AMERICA CO., LTD. is DOWA LINE CO., LTD. There are no subsidiary companies.

COUNTER-STATEMENT OF THE CASE[1]

Petitioner's Statement of the Case is inaccurate and somewhat misleading in the following respects:

1. The owners of the tank barges carrying petroleum products, Respondents Bouchard and Maritrans, did not commence limitation proceedings under the 1851 Limitation Act. More correctly, the vessel owners commenced limitation proceedings in the district court under Supplement Rule F, seeking limitation of liability under the 1851 Limitation Act and under OPA 90 as the limitation provisions of each statute may apply to the claims asserted against the vessel owners.

2. The 60-day deadline for filing claims in the limitation cases applied only to those claimants that did not follow the claims presentation procedure of OPA 90 section 2713(a). *See* injunction and monition reproduced at Appendix 26, 34 to the Petition for Certiorari in Case No. 98-682. *See generally Boca Ciega Hotel, Inc. v. Bouchard Transp. Co., Inc.*, 51 F.3d 235 (11th Cir. 1995) (enforcing the claims presentation procedure). Had Petitioner here followed the claims presentation procedure, the 60-day deadline would not have applied to it.

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[1] A more complete and accurate statement of the case appears in the Petition for Writ of Certiorari filed in *Bouchard Transportation Company, Inc., et al., v. United States*, Case No. 98-682, at pp. 4-8. However, in Case No. 98-682, the Eleventh Amendment issue raised by Petitioner here was not raised. Therefore, the statements of the cases in both petitions should be read together.

3. Bouchard and Maritrans did not file "numerous" counterclaims. Each filed a single counterclaim containing numerous counts.

RESPONSE TO THE PETITION

Respondents submit this response to the petition in order to avoid being deemed to have agreed with Petitioner's framing of the issues and Statement of the Case.

Respondents do not object to the Court's granting the Petition for Writ of Certiorari without waiving their right to oppose Petitioner on the merits if the petition is granted.

The issues raised here are intertwined with the issues raised by the Petition in *Bouchard Transportation Company, Inc., et al. v. United States,* Case No. 98-682: whether the district courts should apply the *concursus* procedure of Supplemental Rule F or some other rule to be fashioned by the Court to give effect to the limitation of liability provisions of OPA 90 section 2704. Therefore, Respondents believe the Court should grant both petitions in

order to review and resolve all of the issues fairly and completely.

Respectfully submitted,

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Nos. 98-682 and 98-752

In the Supreme Court of the United States

OCTOBER TERM, 1998

BOUCHARD TRANSPORTATION COMPANY, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF
FLORIDA, PETITIONER

v.

BOUCHARD TRANSPORTATION COMPANY, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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14 pp

QUESTIONS PRESENTED

1. Whether the concursus procedure under Rule F of the Supplemental Rules For Certain Admiralty and Maritime Claims applies to claims brought under the Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.* (1994 & Supp. II 1996).

2. Whether a federal court retains jurisdiction notwithstanding a State's invocation of the Eleventh Amendment when the State files claims in an action brought under the Limitation of Shipowner's Liability Act of 1851, 46 U.S.C. App. 181-196 (1994 & Supp. II 1996).

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-682

BOUCHARD TRANSPORTATION COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 98-752

DEPARTMENT OF ENVIRONMENTAL PROTECTION OF FLORIDA, PETITIONER

v.

BOUCHARD TRANSPORTATION COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20[1]) is reported at 147 F.3d 1344. The order of the district court (Pet. App. 21-24) is unreported.

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[1] All references to "Pet. App." herein refer to the Appendix to the petition filed in No. 98-682, unless otherwise noted.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 1998. The petition for a writ of certiorari in No. 98-682 was filed on October 26, 1998. The petition for a writ of certiorari in No. 98-752 was filed on October 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Limitation of Shipowner's Liability Act of 1851 (Limitation Act), 46 U.S.C. App. 181-196 (1994 & Supp. II 1996), allows a shipowner to limit his or her liability with respect to claims arising out of a vessel casualty, not involving death or personal injury, to the post-accident value of the ship plus "her freight then pending." 46 U.S.C. App. 183(a). Paragraph (1) of Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims (Rule F) provides that, within six months of receiving a claim in writing, "any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute." Paragraph (2) of Rule F provides that "[t]he complaint shall set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited."

If the vessel owner complies with the requirements for timely filing of a complaint, "all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease." Rule F(3). The court then has the authority to issue notice to all claimants with respect to which the vessel owner seeks limitation of liability, Rule F(4), to require the filing of claims in a single consolidated procedure,

Rule F(5), and, upon determining the vessel owner's liability, to award pro rata shares to the claimants "in proportion to the amounts of their respective claims," Rule F(8). The procedure provides a "concursus" of all claims against the vessel owner arising out of claims consistent with limitations on vessel owner liability provided by statute.

b. In 1990, Congress enacted the Oil Pollution Act (OPA), 33 U.S.C. 2701 *et seq.* (1994 & Supp. II 1996). That legislation followed the catastrophic marine and environmental disaster involving the *Exxon Valdez*, which accidentally discharged more than 11 million gallons of crude oil into Prince William Sound, Alaska. The OPA provides a comprehensive liability scheme for oil spills, applying to cases arising from such accidents, "[n]otwithstanding any other provision or rule of law." 33 U.S.C. 2702(a). Under the OPA, "each responsible party for a vessel or a facility from which oil is discharged * * * is liable for the removal costs and damages." 33 U.S.C. 2702(a). Included in the definition of "responsible party" are vessel owners, operators, and demise charterers. 33 U.S.C. 2701(32)(A).

In addition to changing the parties liable for oil spill damages, the OPA also abandons the Limitation Act's value-of-the-vessel-plus-pending-freight liability formula. "[T]he OPA contemplates a strict liability regime with statutory limits of at least $2 million for tanks vessels and $.5 million for all other vessels. 33 U.S.C. §§ 2702, 2704. Moreover, in certain instances, the OPA imposes virtually unlimited liability on the responsible party. *See* 33 U.S.C. § 2704(c)." *In re Metlife Capital Corp.*, 132 F.3d 818, 822 (1st Cir. 1997), cert. denied, 118 S. Ct. 2367 (1998). Moreover, the OPA liability provisions do not affect the imposition of addi-

tional liability under "State law, including common law." 33 U.S.C. 2718(a)(2).

2. This litigation arises from a collision between a freighter and two tugs in Tampa Bay on August 10, 1993. Pet. App. 4. In the aftermath of the collision, the owners of the three vessels filed petitions under the Limitation Act, 46 U.S.C. App. 183(a). The vessel owners sought exoneration from, or limitation of, liability for damages caused by the collision. Pet. App. 4-6. The district court issued injunctions pursuant to the "concursus" procedure of Rule F and consolidated the three limitations actions with four other cases arising out of the collision. Pet. App. 7.

With all of its claims cognizable in an action brought under the OPA, the United States filed protective claims in these Limitation Act proceedings initiated by the vessel-owner petitioners and then moved to dismiss, without prejudice, on the ground that its OPA claims could be asserted independently of the Limitation Act/Rule F proceedings. The district court granted that motion. Pet. App. 22.

Petitioner Department of Environmental Protection of Florida (Florida) moved to dismiss on the ground that the district court lacked jurisdiction, in light of the Eleventh Amendment, to adjudicate the State's rights arising from the accident. The district court granted that motion. Pet. App. 22-23.[2]

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[2] Initially, the district court had ordered the parties, including Florida, to engage in mediation. The Eleventh Circuit reversed that ruling, however, and remanded the case to the district court for a prompt ruling on Florida's claim of Eleventh Amendment immunity. See *Bouchard Transp. Co.* v. *Florida Dep't of Envtl. Protection*, 91 F.3d 1445, 1448-1449 (11th Cir. 1996).

3. The court of appeals affirmed in part, reversed in part, and remanded for additional proceedings. Pet. App. 19-20. The court first addressed the State's claim of immunity under the Eleventh Amendment. See *id.* at 9-11. The court analogized a Limitation Act proceeding to an admiralty *in rem* action, in which the court has jurisdiction over the res and claimants file claims to it: "Like an in rem proceeding, the plaintiffs in the limitation proceeding neither named any specific entities as defendants in their complaints nor formally served process on any defendants." *Id.* at 10. Rather, "the plaintiffs posted security bonds with the district court in the amount of their maximum liability and the district court notified potential claimants to make their claims on the res deposited with the district court." *Id.* at 11. Invoking *California* v. *Deep Sea Research, Inc.*, 118 S. Ct. 1464 (1998), the court of appeals held that Florida's Eleventh Amendment immunity did not apply in this Limitation Act case because the suit is "sufficiently analogous" to an *in rem* proceeding. Pet. App. 10-11.

The court of appeals then addressed whether Rule F concursus procedures apply to claims brought pursuant to OPA. The court gave two reasons for holding that OPA claims are not subject to Rule F concursus: "(1) OPA 90 claimants do not face a limited fund necessitating a pro rata distribution; and (2) Congress has specifically set forth procedures to implement the strictures of OPA 90." Pet. App. 12. The court concluded that, in cases involving maritime oil spills, Congress intended for OPA to override the Limitation Act's liability provisions and to accomplish the statutory aim of establishing liability for oil spill removal costs "without the assistance of Rule F." *Id.* at 14.

ARGUMENT

The decision of the court of appeals is correct with respect to both its Rule F and Eleventh Amendment holdings, and does not conflict with any decision of this Court or any court of appeals. Accordingly, further review is unwarranted.

1. The vessel-owner petitioners (No. 98-682) contend that, even with respect to claims that are not cognizable under the Limitation Act, the procedural requirements of Rule F (or some new concursus rule to be created by this Court) should be applied to this case. That argument is incorrect.

The Limitation Act allows a vessel owner to limit his or her liability with respect to claims arising out of a vessel casualty, not involving death or personal injury, to the post-accident value of the ship plus "her freight then pending." 46 U.S.C. App. 183(a). Congress, however, has prescribed a different scheme for liability in those maritime accidents causing the discharge of crude oil or refined petroleum products; that more specific statutory scheme supersedes the Limitation Act with respect to this class of cases. See *In re Metlife Capital Corp.*, *supra*.[3] The vessel-owner petitioners, in fact, do not challenge the premise that the substantive scheme of liability set forth in the Limitation Act does not apply to this litigation.

Rule F was adopted to implement the Limitation Act. Even though the substantive liability provisions of the

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[3] The courts of appeals have reached similar conclusions on the interplay between the Limitation Act and the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, *In re Oswego Barge Corp.*, 664 F.2d 327, 340 (2d Cir. 1981), and the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. 1651 *et seq.*, *In re Glacier Bay*, 944 F.2d 577, 583 (9th Cir. 1991).

Limitation Act do not apply here, petitioners nevertheless seek to impose the Rule F "concursus" procedure on this OPA case. That proposition lacks merit. As the court of appeals concluded, Congress has expressly provided procedures for OPA litigation and those procedures are incompatible with Rule F. Pet. App. 14-15. See also *In re Metlife*, 132 F.3d at 823-824.

Petitioners (No. 98-682 Pet. 12) express concern that there "may" not be sufficient means to protect them from incurring liability that exceeds the limits set forth in the OPA. Parties in OPA litigation, however, may invoke the same procedures generally available to litigants in the federal court system: consolidation under Federal Rule of Civil Procedure 42; transfer for *forum non conveniens* under 28 U.S.C. 1404(a); and multidistrict litigation under 28 U.S.C. 1407. Speculation that those traditional tools will prove to be inadequate is premature and does not provide any basis for further review.[4]

2. Petitioner Department of Environmental Protection of Florida (No. 98-752 Pet. 6-9) contends that the Eleventh Amendment obviates the need for a State to participate in a Limitation Act proceeding that will adjudicate the claims of liability of the vessel owner, upon pain of forfeiting that State's claims. The court of

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[4] Moreover, the vessel owners' fears are even more speculative than they acknowledge. The vessel-owner petitioners' argument is based on the untested assumption that they are protected by the OPA's dollar-per-ton liability limits under 33 U.S.C. 2704(a)(1) (1994 & Supp. II 1996). The OPA's liability limits are not always available to a responsible party and, in this litigation, the government maintains that none of the vessel-owner petitioners qualifies for the OPA limitation due to their alleged violations of federal safety rules. See 33 U.S.C. 2704(c)(1)(B). That question has not yet been addressed by the district court.

appeals correctly rejected that argument. For purposes of the Eleventh Amendment claim being asserted by the State, there is no material difference between a Limitation Act proceeding that determines various claimants' interests in liability apportionment and an *in rem* proceeding that determines claimants' ownership interests. Both types of disputes involve invocations of federal admiralty jurisdiction. Like an *in rem* proceeding, the Limitation Act action seeks no property or funds that are in the State's possession; rather, the vessel owner seeks a declaration from the court limiting or exonerating it from liability. The policies favoring unitary admiralty jurisdiction, see *Deep Sea Research*, 118 S. Ct. at 1470, are equally present in the Limitation Act context and the putative threat to a State's Eleventh Amendment immunity is equally absent. Although the Limitation Act has been on the books for nearly a century and a half, this apparently is the first time a court of appeals has confronted an Eleventh Amendment challenge by a State to the concursus procedure. See No. 98-752 Pet. 9; Pet. App. 9 n.3.

3. In addition, Petitioner Department of Environmental Protection of Florida (98-752 Pet. 9-11) argues that the vessel owners' pursuit of counterclaims against the State is barred under the Eleventh Amendment. That claim, however, was not passed on by the court of appeals. The court of appeals' silence on the issue may have stemmed from the State's failure to specify its arguments regarding the counterclaims as a separate

issue.[5] Florida could have sought rehearing in the court of appeals, bringing that possibly overlooked argument to the court's attention, but it did not. See Fed. R. App. P. 40. Nor does the State offer any conflicting decision by any other court on the issue. Accordingly, even if the court erred in having failed to consider separately the Eleventh Amendment implications of counterclaims brought against the State in a concursus proceeding, this case would not be a suitable vehicle for considering that issue.

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[5] The Statement of the Issues in Florida's brief as appellee (filed in 11th Cir., Nos. 96-3494, et al., at 12) framed the issues as follows:

> I. Whether the Eleventh Amendment immunity of a State from suit in federal court applies in the context of an admiralty limitation of liability proceeding.
>
> II. Whether vessel owners may use the admiralty limitation of liability procedures of Supplemental Rule F to circumvent the Oil Pollution Act of 1990 with regard to claims arising out of an oil spill in Florida waters.
>
> III. Whether the injunctions against prosecution of claims against the vessel owners and their vessels outside of the limitation cases should be enforced even if the use of Supplemental Rule F is limited.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

DEPARTMENT OF ENVIRONMENTAL PROTECTION
of the State of Florida,

Petitioner,

v.

BOUCHARD TRANSPORTATION COMPANY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eleventh Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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7 pp

QUESTIONS PRESENTED

I. Whether the Eleventh Amendment allows an admiralty court to compel a state to file or forfeit claims in a proceeding under the Limitation of Liability Act.

II. Whether private vessel owners proceeding under the Limitation of Liability Act may bring, in response to a state's compelled maritime claim, common or state law counterclaims for damages which would be barred by the Eleventh Amendment.

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

REPLY TO RESPONDENTS' "COUNTER-STATEMENT"

The first numbered paragraph in Respondents' "counter-statement" is mistaken and reveals Respondents' misunderstanding of the law. The substantive right under which the case was brought is statutory; that is, the right to limit liability under the 1851 Limitation of Liability Act. In contrast, Supplemental Rule F is the device for effectuating that right. It is Respondents' use of the Limitation Act, as applied through Rule F to compel Florida into federal court, which offends the Eleventh Amendment.

As Respondents necessarily concede, Florida's maritime claim was subject to the 60-day deadline of Rule F. Respondents contend the other claims were subject to other deadlines under the Oil Spill Act of 1990 and state law. Regardless of the actual number of days to present a claim, the Florida Department of Environmental Protection (DEP) was forced into federal court by a private party invoking the Limitation Act.

REPLY TO RESPONDENTS' ARGUMENT

The Eleventh Amendment Questions Presented By Petitioner Are Not Entwined With The Statutory Interpretation Issues Raised By Respondents In A Separate Petition For Certiorari (Case No. 98-682).

Bouchard concedes it would be appropriate to grant the petition for certiorari by DEP. However, Bouchard attempts to bootstrap its separate and insufficient petition (case no. 98-682) into review, by claiming the two petitions raise entwined issues.

The only common feature of the petitions is that the same, three-vessel collision led to both. DEP's petition raises two Eleventh Amendment questions, which have added importance based on federalism and respect for state sovereignty. In contrast, Bouchard's petition urges only that the Eleventh Circuit interpreted a federal statue incorrectly, albeit consistentlv with another circuit court of appeals. Even if incorrect, the Eleventh Circuit's interpretation leaves Bouchard with the totally adequate and constitutionally acceptable remedy of defending itself in state court.

Otherwise, Bouchard's argument expresses no more than disagreement with the policy choices made by Congress when it enacted the Oil Pollution Act of 1990. Bouchard is free to

disagree, but the proper recourse is in Congress, not this Court. However, this Court is the proper forum for resolving Florida's Eleventh Amendment questions. Bouchard's transparent attempt to take advantage of the strength of DEP's petition must be rejected by this Court.

CONCLUSION

The Court should grant DEP's petition for writ of certiorari in this case, while denying Bouchard's separate petition in case no. 98-682.

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